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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 799

UNION INSURANCE AGENCY AND ALLEN M. DORFMAN, INDIVIDUALLY AND AS A CO-PARTNER OF UNION INSURANCE AGENCY,

Appellants,

vs.

LEFFERT HOLZ, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE NEW YORK SUPREME COURT, APPELLATE DIVISION — FIRST DEPARTMENT.

JURISDICTIONAL STATEMENT.

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OPINION BELOW.

The order of the New York Supreme Court, Appellate Division, First Department, of April 24, 1956, was not reported in full, 1 A. D. 2d 945, 151 N. Y. S. 2d 926, and the judgment thereon of May 9, 1956, was not reported. A copy of the order is annexed as Appendix A, *infra*, and a copy of the judgment is annexed as Appendix B, *infra*. No opinion was rendered by the court below (R. 264).

JURISDICTION.

The order of the New York Supreme Court, Appellate Division, First Department, was entered April 24, 1956 (Appendix A; R. 241; 1 A. D. 2d 945, 151 N. Y. S. 2d 926) and the judgment thereon was entered on May 9, 1956 (Appendix B; R. 240). The appellants appealed to the Court of Appeals of the State of New York and made a motion for leave to appeal to the Court of Appeals. The appellee made a motion in the Court of Appeals to dismiss the appeal taken as of right. On July 11, 1956, the Court of Appeals denied the motion for leave to appeal (R. 306; 1 N. Y. 2d 921, 154 N. Y. S. 2d 978, 136 N. E. 2d 919). Also on July 11, 1956, the Court of Appeals granted the motion to dismiss the appeal taken as of right and dismissed the appeal taken as of right (R. 307; 1 N. Y. 2d 921, 154 N. Y. S. 2d 978, 136 N. E. 2d 919). The appellants made a motion in the Court of Appeals for reargument of the motion for leave to appeal and to vacate the order of July 11, 1956, dismissing the appeal taken as of right. On October 11, 1956, the Court of Appeals denied the motion for reargument of the motion for leave to appeal and to vacate the order dismissing the appeal taken as of right (R. 308; 2 N. Y. 2d 727, 138 N. E. 2d 729). No opinions were rendered by either of the courts below (R. 237, 264). Notice of appeal to this Court was filed in the New York Supreme Court, Appellate Division, First Department, on January 2, 1957 (R. 243, 248). The jurisdiction of this Court to review on appeal a final order and judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution • • • of the United States, and the decision is in favor of its validity," is conferred by 28 U. S. C. 1257 (2).

STATUTES INVOLVED.

The New York Insurance Law, Consolidated Laws of New York, Insurance Law, §§ 28, 29 and 117, provides in pertinent part:

SECTION 28.

"1. The superintendent may make an examination into the affairs of any insurance corporation or other insurer doing any insurance business in this state or authorized to do an insurance business in this state or, of any pension fund, retirement system or other organization which is required by law to make reports to, or is subject to examination by, the insurance department as often as he deems it expedient for the protection of the interests of the people of this state, in addition to examinations authorized by other provisions of this chapter. * * *"

SECTION 29.

"Whenever pursuant to any provision of this chapter, the superintendent shall determine to examine the affairs of any insurer or other person, he shall make an order indicating the scope of the examination and may appoint as examiners one or more competent persons not employed by any insurer or interested in any insurer except as a policyholder. A copy of such order shall upon demand be exhibited to the insurer or person whose affairs are to be examined before the examination begins. Any examiner authorized by the superintendent shall have convenient access at all reasonable hours to the books, records, files, securities and other documents of such insurer or other person, including those of any affiliated or subsidiary companies thereof, which are relevant to the examination, and shall have power to administer oaths and to examine under oath any officer or agent of such insurer or other person, and any other person having custody or control of such documents, regarding any matter relevant to the examination. The

officers and agents of such insurer or other person shall facilitate such examination and aid such examiners in conducting the same so far as it is in their power to do so. The refusal of any insurer to submit to examination shall be ground for revocation or refusal of a license or renewal license. The examiner or examiners in charge of such examination shall make a true report of every examination made by him, verified under oath, which shall comprise only facts appearing upon the books, records, or other documents of such insurer or other person or as ascertained from the sworn testimony of its officers or agents or other persons examined concerning its affairs, and such conclusions and recommendations as may reasonably be warranted from such facts. * * *"

SECTION 117.

"1. The superintendent may revoke, or may suspend for such period as he may determine, any insurance agent's license, if after notice and hearing as specified in this chapter, he determines that the licensee or any sub-licensee

"(a) has violated any provision of, or any obligation imposed by, the insurance law or has violated any law in the course of his dealings as agent; or

"(b) has made a material misstatement in the application for such license; or

"(c) has been guilty of fraudulent or dishonest practices; or

"(d) has demonstrated his incompetency or untrustworthiness to act as an insurance agent * * *"

QUESTIONS PRESENTED.

1. Whether Sections 28, 29 and 117 of the New York Insurance Law, as construed by the highest court of the State of New York in which a decision could be had, to permit the Superintendent of Insurance of New York to revoke appellants' licenses as insurance agents for their refusal to submit to his unlawful assertions of authority over their personal and private affairs without adequate notice, without opportunity to defend themselves and without a fair and impartial hearing, constitute deprivation of due process and an unwarranted invasion of privacy contrary to the Fourteenth Amendment of the Constitution of the United States.

2. Whether Section 117 of the New York Insurance Law as applied by the highest court of the State of New York in which a decision could be had, violates the Fourteenth Amendment of the Constitution of the United States in that it permits the Superintendent of Insurance of New York to apply the law arbitrarily, unreasonably and capriciously, and it clothes him with arbitrary and discriminatory powers and with a discretion that can be exercised through considerations of mere caprice, favoritism or prejudice.

STATEMENT.

The Superintendent of Insurance of the State of New York revoked appellants' licenses as insurance agents because, upon advice of counsel, they did not turn over to examiners for the Department of Insurance certain records maintained in appellants' place of business in Chicago relating to appellants' private affairs and completely unrelated to any insurance policies obtained in New York, which records the examiners demanded notwithstanding (a) that the Superintendent of Insurance had no statutory authority to make such demand, (b) that the Superintendent had entered no order of any kind authorizing an examination or investigation of appellants' affairs and (c) that the order entered by the Superintendent of Insurance authorizing an examination of the insurance carrier which appellants represented was not exhibited, although request therefor was made.

The Union Casualty Company (which became the Union Casualty and Life Insurance Company) had been examined as of September 30, 1951 by the Superintendent of Insurance of the State of New York in accordance with an appointment authorizing such examination dated December 30, 1948 (R. 80). The examination of the Company's condition as of September 30, 1951 was completed and a report dated March 31, 1953 was prepared (Insurance Department's Exhibit 5; R. 194), in which a question was raised as to the reimbursement by the Company of expenses in the amount of $26,343.72 incurred by the appellants as agents and "not supported by proper and adequate data." The appellants carry on the business of insurance agents at Chicago in the State of Illinois (R. 193). The report concluded in respect to these expenses as follows:

> "It is recommended that the company take immediate steps to recover from the agent the amounts im-

properly paid to him *or obtain adequate vouchers for expenses incurred in connection with servicing the specific risks"* (emphasis supplied).

The expenses in question were incurred as a result of servicing claims paid in connection with the Central States Drivers Council and Michigan Conference of Teamsters risks, neither of which required the appellants to be licensed as agents in the State of New York (R. 219-226).* These expenses, which were relatively minute when considered in connection with the eleven to thirteen million dollars of premiums collected by the appellants during the same period (R. 67), were investigated by examiners for the Superintendent of Insurance of New York in February of 1952 (R. 111, 112-3). The examiners testified that they were satisfied that the $26,000 was actually expended (R. 92, 95). Subsequently, the appellants furnished supporting vouchers (R. 107-8) and Mr. Herbert, the assistant treasurer of Union Casualty and Life Insurance Company, prepared a complete report with attached working papers, supporting the expenses questioned (R. 219-226). Subsequent to that, Mr. Kosman, Vice President and General Counsel of the Company advised the Department of Insurance that the requirements of the report of March 31, 1953 had been fully complied with and, in response to a request by the Department, had outlined in detail the ways in which compliance had been effectuated (R. 123). In the hearing before the deputy superintendent which resulted in the determination confirmed by the Appellate Division, appellants offered to prove that the matter of the expenses had been disposed of and dropped (R. 72-3), which offer was rejected.

Subsequently and on July 20, 1953, the Superintendent of Insurance issued a second appointment authorizing "a

* The appellants had only one contract in the State of New York and that contract expired in May, 1954 (R. 164).

special examination on condition of the Union Casualty and Life Insurance Company" (R. 194). Although this appointment did not mention either of the appellants by name, on December 1, 1953, Senior Examiners Horan and Schwartz of the New York Insurance Department appeared at the office in Chicago of appellants and demanded to see all of the books and records of the agency (R. 152, 153, 156, 157, 48, 52, 53, 101, 126) upon the pretext that the $26,000 expense item required further investigation (R. 32, 52-3, 66-7, 70). One of the appellants, Mr. Dorfman, contacted his counsel and on that same day counsel requested of Messrs. Horan and Schwartz what books and records they desired to see (R. 52). They demanded all the books and records and stated that it was not necessary for them to give any explanations of why the demand was made (R. 153, 53, 126). Counsel asked what their authority was for making such a sweeping demand but they refused to exhibit any authorization (R. 41, 48, 51, 68-9, 125, 128, 129-30, 153-4). Counsel said that he would study the applicable law and advise them later whether he would recommend to his clients, the appellants, that they comply with the demand. On December 4, 1953, counsel advised Messrs. Horan and Schwartz that he had made a thorough and exhaustive study of the applicable law and that he would recommend to the appellants that they produce any and all records pertaining to the Union Casualty and Life Insurance Company but that they not produce all of the personal books and records of the agency as demanded by the examiners (R. 61, 156-9). Thereupon, on advice of counsel, the appellants offered to produce all of the books and records under their control relating to the Union Casualty and Life Insurance Company but refused to produce personal records and books of the agency not related to Union Casualty and Life Insurance Company (R. 61, 156-9).

On January 26, 1954, a citation was issued by the New York Insurance Department charging the appellants with having violated Section 29 of the New York Insurance Law in refusing to produce certain books and records and for having demonstrated incompetency or untrustworthiness to act as insurance agents under Section 117 of the New York Insurance Law (R. 184-7). The appellants were cited to appear at a hearing to show cause why all licenses issued to them by the New York Insurance Department should not be suspended or revoked or why any other penalty provided by law should not be imposed. The appellants filed an answer to the citation (R. 188-192), which, among other defenses, raised all of the constitutional questions presented here.

On March 5, 1954, a hearing was held before Thomas F. Newman, Jr., Deputy Superintendent of Insurance (R. 15-169). On October 18, 1954, it was determined and ordered that all licenses issued to each of the appellants be revoked and that all pending applications for licenses be denied (R. 183).

The Appellate Division, First Department, in an order entered April 24, 1956, unanimously confirmed the determination of the Superintendent of Insurance.

THE QUESTIONS ARE SUBSTANTIAL.

1. The Superintendent of Insurance of the State of New York has revoked appellants' licenses as insurance agents upon the theory that if an agent does not accede to his every request or demand, however arbitrary or outrageous, the agent has violated the New York Insurance Law and is incompetent and untrustworthy.

If the Superintendent in his discretion can determine that any act whatsoever, or any failure to act whatsoever, in any way not to his liking renders an agent or broker

"incompetent and untrustworthy," such a construction and interpretation is unconstitutional and void under the Federal Constitution. If Section 117 of the New York Insurance Law permits the Superintendent to revoke a license of an agent on the ground that such agent has failed to produce documents which are completely personal, have no connection whatsoever with any matter relating to insurance business conducted in the State of New York, and entirely irrelevant to any inquiry then being held, then Section 117 is unconstitutional and void.

If a person acting upon the advice of counsel, is confronted with a sweeping demand for all of his books and records without being shown any written basis for such demand and without being told the reason for the demand and by that very act of following his counsel's advice is held to be "incompetent" or "untrustworthy", then he has never been given any notice of why the demand was made or why he has become "incompetent" or "untrustworthy", contrary to the due process requirements of the Federal Constitution. Furthermore, he has been deprived of a hearing unless it is argued a "hearing" took place when the examiners asked for all of his books and records and told him that it was none of his business why the books and records were sought. The formal hearing held before the Deputy Superintendent then becomes a mere mockery and no hearing at all because the Deputy Superintendent in effect holds that failure to bow to the examiner's demands, *however unreasonable and arbitrary they may be*, establishes "incompetence" and "untrustworthiness." No notice is ever given, no hearing is ever held, and no determination is ever made of the reasonableness, the fairness and the justice of the examiners' demands. Extreme examples can be given to illustrate the magnitude of the effects of this kind of a proceeding: What if the examiner demanded a money bribe to desist from further harass-

ment? Would the agent be "incompetent" or "untrustworthy" for failing to comply with the demand? If the demand is "unreasonable", when is the reasonableness determined? When is a hearing held on reasonableness? Must the bribe be paid upon the penalty that failure to pay may cost a license?

If the "hearing" is in reality held by the examiners when they decide how broad an examination they will make, how can the Superintendent ever make his determination to revoke a license since he neither personally hears nor do the examiners ever transmit to the Superintendent a copy of the record, make findings, or make recommendations based upon the record of a hearing.

If the decision below stands, every licensee must accede to the absolute and dictatorial power of the Superintendent of Insurance or lose his license.

2. Section 117 is unconstitutional and void as it is sought to be applied in that it permits the New York State Insurance Department and Superintendent to apply the insurance law arbitrarily, unreasonably and capriciously, and it clothes the Department and Superintendent with arbitrary and discriminatory powers and with a discretion that can be exercised through considerations of mere caprice, favoritism or prejudice inasmuch as the legislature has failed to establish, prescribe, define or create sufficient, adequate or complete standards, tests, guides, definitions, terms, conditions, or rules by which the Department or Superintendent can apply said law. The failure to establish adequate standards results in violation of the Fourteenth Amendment of the Constitution of the United States. *Saia* v. *People of State of New York*, 334 U. S. 558, 68 S. Ct. 1148 (1948); *Kunz* v. *People of State of New York*, 340 U. S. 290, 71 S. Ct. 312 (1915); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 72 S. Ct. 777 (1952).

CONCLUSION.

For the reasons stated above, the question presented is an important one which should be resolved by this Court.

Respectfully submitted,

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Chicago 2, Illinois,

ROBERT A. SPRECHER,
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Chicago 3, Illinois.

APPENDIX A.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of April, 1956.

Present:

Hon. Charles D. Breitel, Justice Presiding.

Hon. Joseph A. Cox,
Hon. Martin M. Frank,
Hon. Francis L. Valente,
Hon. Earle C. Bastow,
} Justices.

In the Matter of

Union Insurance Agency and Allen M. Dorfman, individually and as a co-partner of Union Insurance Agency,

Petrs.,

for an Order pursuant to Article 78 of the Civil Practice Act,

—*against*—

Leffert Holz, as Superintendent of Insurance of the State of New York,

Respt.

} 9945.

The above-named petitioners having moved at a Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Act, for a review by the court of the determination of the respondent, Superintendent of Insurance of the State of New York, revoking petitioners' existing licenses and denying their applications for a renewal thereof, and for other and further relief; and

all the proceedings thereupon had in said court, together with all the papers upon which the same are based, having been transferred by order of said court, entered on the 21st day of February, 1955, to this court for review and determination; and the said proceeding coming on to be heard, and having been argued by Mr. Stanford Clinton of counsel for the petitioners, and by Mr. Samuel A. Hirshowitz of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the said determination be and the same hereby is confirmed with $50 costs and disbursements to the respondent and the petition dismissed.

Enter:

GEORGE T. CAMPBELL,
Clerk.

APPENDIX B.

SUPREME COURT : NEW YORK COUNTY.

In the Matter of
Union Insurance Agency and Allen M. Dorfman, individually and as a co-partner of Union Insurance Agency,
Petitioners,
against
Leffert Holz, as Superintendent of Insurance of the State of New York,
Respondent.
} 1883-1955

JUDGMENT.

The above named petitioners having moved at a Special Term of the Supreme Court, New York County, for a review of the determination of the respondent, and the said proceeding having been transferred to the Appellate Division, First Department, and the proceeding having been argued, and after due deliberation the said Appellate Division, First Department, having ordered that the said determination of the respondent, Superintendent of Insurance be confirmed with Fifty and 00/100 ($50.00) Dollars costs and disbursements to the respondent, and the petition dismissed; it is on motion of Jacob K. Javits, Attorney General of the State of New York, hereby

ADJUDGED, that the respondent, Leffert Holz, Superintendent of Insurance, of 61 Broadway, New York, New York, recover of the petitioners, Union Insurance Agency and Allen M. Dorfman, of 134 North La Salle Street, Chi-

cago, Illinois, the sum of One Hundred Seven and 50/100 ($107.50) Dollars costs as taxed, and that the respondent shall have execution therefor.

Judgment signed and entered the 9th day of May, 1956.

ARCHIBALD R. WATSON,
Clerk.